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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARC ARACE, Plaintiff and Appellant, v. SAM-MED BUILDING, LLC, Defendant and Appellant.	H041333 (Santa Clara County Super. Ct. No. CV201627)

INTRODUCTION

This appeal arises from a negligence case tried before the court sitting as the finder of fact. After the plaintiff rested, the trial court granted the defendant's motion for judgment. Were this an appeal from a judgment entered after a motion for nonsuit in a jury trial, perhaps the outcome of this appeal would be different. As we shall explain, however, as both parties agreed to try their case to the court, its determination that plaintiff failed to meet his burden of proof will be affirmed.

Mark Arace, plaintiff and appellant, fell and was injured in a building owned by defendant Sam-Med Building, LLC (Sam-Med). Arace claimed that his fall was caused by various problems with a mat on the floor of Sam-Med's lobby. The trial court granted Sam-Med's motion for judgment. In its statement of decision, the court found that Arace had not met his burden to show that Sam-Med had failed to keep the property in a reasonably safe condition and that, even if Sam-Med had been negligent, Arace had

failed to meet his burden to show that Sam-Med had caused his injuries. The trial court also declined to apply the doctrine of res ipsa loquitur and, separately, refused to shift the burden of proof to Sam-Med to prove that it was not negligent. On appeal, Arace challenges both the factual and legal determinations made by the trial court. Because none of his arguments convince us that a reversible error was made, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the fall which gave rise to this lawsuit, Arace was 58 years old and had worked as a postal collector for 27 years until his retirement in December 2006. In the years since his retirement, Arace had a health problem with his legs which made them stiff and painful. He also had a limp and a problem with his hip. He was prone to "circumambulation," i.e., swinging out of the legs to move forward.

In addition, Arace suffered from a "nasty fall" in 2005. In 2007, he had been hospitalized for difficulties with breathing, weakness, and an inability to walk. He was also suffering from incoherence that year. In December 2007, he had an incident in which his leg had hit a chair in his apartment causing him to bleed.

On May 26, 2009, Arace and his brother Paul[1] accompanied their father to a doctor's appointment at 2410 Samaritan Drive in San Jose. The building was owned by defendant Sam-Med. Dr. Joe Morgensen was both the building manager for the property when plaintiff fell and was the doctor that plaintiff's father was seeing on that day.

When Arace, his brother Paul, and his father arrived at the doctor's office, they entered the building's first floor lobby and then went to the second floor to see Dr. Morgensen. Appellant and his father, who was in a "scooter," took the elevator while

[1] We refer to appellant's brother, Paul Arace, by his first name only. We do so for clarity only. No disrespect is intended.

Paul took the stairs. After the appointment, the three returned to the first floor, Arace and his father again taking the elevator while Paul took the stairs.

Paul was the first to arrive on the ground floor. He went to the door, opened it and waited for Arace and their father on the elevator. The elevator door opened and Paul saw his father and brother start to come out. Paul saw his father moving toward the door followed by Arace.

Then came the fall. Arace was looking toward the exit and at his father and brother when he fell, but, at trial, he did not say (and was not asked) why he fell. His brother Paul, however, stated that he saw Arace "hit the corner of [the mat] and it kind of flipped up and he lost his balance . . . ." Paul also said of the mat that "the closest corner to him was the corner that he hit and it kind of flipped up to where he lost his balance and that's what caused him to lose his balance and fall." Paul also stated he "saw [Arace] trip on the mat" and then Arace "fell"—he "saw him hit the corner of the mat and fall."

Appellant was bleeding after the fall. Paul ran to a doctor's office in the building and asked for a 911 call. Before the paramedics arrived about five minutes later, a nurse, Nancyanne Olson, arrived and started to try to control appellant's bleeding—Arace was lifted from the floor to a chair. It appeared to the nurse that Arace was bleeding from his right lower leg, but possibly both legs, but she had not seen Arace fall herself. After the paramedics arrived, Arace was taken to the emergency room at Good Samaritan Hospital across the street.

The floor mat on which Arace had fallen was soaked with blood after the fall. It had already been thrown away by the time Dr. Morgensen learned of Arace's fall and his permission to throw it away had not been sought. Sharleen Kakolewski, a staff member at Samaritan Internal Medicine Group, discarded it, apparently on the instructions of another staff member, Carmen Petia. Dr. Morgensen believed that the mat had been

thrown away because it had so much blood on it. The nurse who assisted Arace on the date of his fall, Olson, also recalled that the mat had been "soaked" with Arace's blood.

At trial, Paul also recalled that, in his visits to the office over an approximate period of two to three years before May 26, 2009, he had never seen a problem with the mat. Nor did he see any problem with the mat on the day of his brother's fall. Arace himself stated that he had walked through the lobby over 30 to 40 times without incident. Dr. Morgensen was also aware of no other falls on the property before Arace's. He had never seen the mat "deform" when walking over it.

At trial, Arace also relied upon Dr. Kenneth Nemire, a forensic human actors expert. Dr. Nemire opined that Sem-Med's floor mat was too thick, it was not secured to the floor, and it should have been made more conspicuous. However, Dr. Nemire also conceded that it was "not clear from the evidence how—exactly how the Plaintiff interacted with the mat, period." He stated that Arace could have tripped on the edge of the mat, that he could have been a victim to a "stick and fall," or he could have slipped on the mat because it was loose. When pressed to state exactly how Arace fell, Dr. Nemire stated: "Just that there is [*sic*] indication that it was through an interaction with the mat."

The operative pleading at the time of trial was appellant's first amended complaint. Arace purported to state four separate causes of action which he called negligence, negligence per se, premises liability, and res ipsa loquitur, all of which centered around the mat in Sam-Med's lobby.[2]

[2] Appellant's negligence per se claim was based on the allegation that Sam-Med's floor and mat violated "Section 4.5 of Title 28 of the Code of Federal Regulations Part 36." Arace does not raise any arguments relevant to this claim on appeal.

Both Arace and Sam-Med agreed to try the case without a jury. After plaintiff rested, Sam-Med moved for judgment under Code of Civil Procedure section 631.8.[3] The trial court heard oral argument and granted the motion.

Arace requested a statement of decision on 17 different issues. Sam-Med served Arace a proposed statement of decision, to which Arace objected in a document over 29 pages in length.[4] In addition to a great number of other points raised, Arace objected that the testimony of his brother Paul, Olson, and Dr. Nemire was not being accorded proper weight or was being ignored. Arace also objected to the proposed rejection of res ipsa loquitur and the court's refusal to shift the burden entirely to Sam-Med.[5]

The trial court subsequently filed its statement of decision. In general, the court relied upon the same set of witness statements to find that Arace had failed to show both that Sam-Med's property was in an unreasonably unsafe condition and that he had failed to show that his injuries were caused by any negligence on Sam-Med's party.[6]

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[3] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

[4] Arace has filed an unopposed motion to augment the record with the proposed statement of decision. The motion is granted. (See Cal. Rules of Court, rule 8.155(a)(1).)

[5] In objecting to the proposed statement of decision below, Arace included essentially the same arguments he does here, along with many others. We therefore reject Sam-Med's argument that Arace forfeited several of his arguments by failing to raise them below.

[6] As stated by the trial court: "Plaintiff did not prove that Defendant failed to use reasonable care to keep what Plaintiff terms the 'INCIDENT SITE' in a reasonably safe condition. Plaintiff's testimony did not state what caused him to fall. Plaintiff's brother's testimony was that when Plaintiff's foot hit the corner of the mat it 'kind of flipped up.' Plaintiff's brother also testified that he had never observed any problems with the mat at his many prior visits to Defendant's building and that when he took photographs after the incident he did not see anything defective about the mat. Another witness, Ms. Olsen [*sic*], testified she did not see Plaintiff's fall. Plaintiff's expert opinion was that there were numerous possibilities of what caused Plaintiff's fall."

The statement of decision also addressed each of the 17 requests made by Arace. It rejected the application of res ipsa loquitur, noting that Arace had not shown that the doctrine should be invoked simply because there had been a fall and that Arace had failed to show that there was a dangerous condition of Sam-Med's property. In refusing to shift the burden of proof, the trial court noted that it was "understandable and reasonable" for Sam-Med to have discarded the mat, as it had "blood all over it," that it was not impossible for Arace to prove his case without the mat, and that a statement of Arace's counsel indicated that the case was not "about" the mat itself. Judgment in favor of defendant was filed on May 9, 2014 and this timely appeal followed.

DISCUSSION

Arace argues that we should reverse the judgment because: 1) the trial court incorrectly applied a premises liability analysis to a general negligence claim; 2) the trial's courts factual findings are not supported by substantial evidence; 3) the doctrine of res ipsa loquitur should have been applied in his favor; 4) the burden of proof should have been shifted to Sam-Med because Sam-Med discarded the mat Arace claims caused his fall, and; 5) his due process rights were violated because the trial court applied an incorrect legal standard to his claim and because the trial court's written statement of decision on Sam-Med's motion for judgment for judgment differed from the court's tentative oral order. Before turning to each of these arguments, we must first discuss the applicable standard of review.

Regarding causation, the statement of decision found that, "[a]fter weighing the testimony and evidence and hearing argument, this Court makes the factual determination that Plaintiff did not meet his burden by a preponderance of the evidence that Defendant's conduct caused Plaintiff's injury. As outlined above, Plaintiff and his witnesses did not prove what caused him to fall." As an additional basis to find that Arace had not proven causation, the trial court also noted that Arace had failed to introduce any testimony from the physician as to what may have caused Arace's injuries.

I. Standard of Review

In addressing the appropriate standard of review, it is useful to contrast a motion "for judgment" under section 631.8 in a trial before the court with a motion for a "judgment of nonsuit" in a trial by jury under section 581c. (See §§ 581c, subd. (a), 631.8, subd. (a).) In a motion for nonsuit, the trial court "may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) And any appeal from the granting of such a motion would be reviewed de novo, with the appellate court applying the same standard to the determination of the motion as the trial court. (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542.)

In a motion for judgment under section 631.8, on the other hand, the trial court "must decide questions of credibility, must weigh the evidence, and must make findings of fact. [Citations]." (*Lingenfelter v. County of Fresno* (2007) 154 Cal.App.4th 198, 204.) "Because section 631.8 authorizes the trial court to weigh evidence and make findings, the court may refuse to believe witnesses and draw conclusions at odds with expert opinion." (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 550, citing *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255.) As was stated before the enactment of section 631.8, "[i]t could well be argued that there is little purpose in requiring a trial judge to listen to a long, drawn-out defense when [he or she] is convinced the plaintiff has failed to prove a case." (*Lasry v. Lederman* (1957) 147 Cal.App.2d 480, 488.)[7]

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[7] It has been said that motions for nonsuit are disfavored. (See *Kardly v. State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479, 483.) Although motions for judgment under section 631.8 are reviewed under different standards than nonsuit motions under section 581c, there is one way in which both motions are alike. Completed trials are the favored means of adjudication. Section 631.8, though enacted over 50 years ago, has seen scant use (resulting in an average of less than six published appellate cases per year). Allowing both sides to tell their story has proven the best

Because the trial court is the finder of fact, disputed factual findings on appeal involving a motion under section 631.8 are reviewed for substantial evidence while legal conclusions are reviewed de novo. (*Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1269.) " 'The standard of review of a judgment and its underlying findings entered pursuant to . . . section 631.8 is the same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment "are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence." ' " (*Ibid.*, quoting *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc*. (1999) 73 Cal.App.4th 517, 528 (*San Diego Met*); see also *Locklin v. City of Lafeyette* (1994) 7 Cal.4th 327, 369-370 [substantial evidence test applies to appeals from judgments granted after a motion for judgment under section 631.8].)

In addition, we "review the trial court's express factual findings, and any implied findings, for substantial evidence. [Citations]." (*Apex, LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999, 1009.) The trial court's findings of fact are liberally construed to support the judgment. (*Jeffrey Kavin, Inc. v. Frye* (2012) 204 Cal.App.4th 35, 43.)

Under the substantial evidence test, as it is typically formulated, "the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination. [Citation]." (*San Diego Met, supra*, 73 Cal.App.4th at p. 528.) "The appellate court views the evidence in the light most favorable to the respondents [citation], resolves all evidentiary conflicts in favor of the prevailing party

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practice because it results in closure, rather than, as here, a claim of fundamental error by the court. This was a close case partly because of the trial court's comments on owner liability.

and indulges all reasonable inferences possible to uphold the trial court's findings [Citation]." (*Ibid.*)

Stating that the substantial evidence test applies does not end the discussion, however. As it was noted more than 50 years ago, "[a]pplication of the substantial evidence rule to findings made under section 631.8 is not without its difficulties." (*Greening v. General Air-Conditioning Corp.* (1965) 233 Cal.App.2d 545, 550 (*Greening*).) These difficulties arise from the fact that, often, such "findings are drawn in negative rather than positive terms." (*Ibid.*) In a negligence case, for example, a section 631.8 motion may result in a trial court's finding, not that "damage was not caused by [a] claimed defect, but rather that there was *no proof* that the damage was so caused." (*Ibid.*) On appeal, then, a reviewing court is tasked with asking whether it can "find *substantial evidence* in support of a finding of *no* evidence . . . ." (*Ibid.*) This "draws the reviewing court into a kind of juridical shell game." (*Ibid.*)

In the context of an appeal involving a section 631.8 motion, a "more palatable" approach has been adopted. (*Greening, supra,* 233 Cal.App.2d at p. 550.) The "following then [is] the appropriate rule on appeal: 'When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court . . . .' " (*Id.* at p. 551; quoting *Callahan v. Gray* (1955) 44 Cal.2d 107, 111.) In other words, as long as a finding of fact made by the trial court is based on a reasonable inference from the evidence presented, it will not be disturbed on appeal—and legal questions will be reviewed de novo.[8] We now turn to each of the arguments raised by Arace.

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[8] Sam-Med points to the same conceptual problem identified in *Greening*, that use of the substantial evidence test, as it is typically phrased, is problematic in appeals involving a party's failure to meet its burden of proof. Sam-Med argues, in effect, that an entirely separate test should be applied, specifically the one explained in *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465-466 (*Sonic Manufacturing*). In that case, which, unlike here, was an appeal from a

II. The Trial Court Did Not Err In Applying Premises Liability Principles

Arace's first claim of error is not clearly argued. His argument seems to be that the trial court improperly conflated the requirements for what he calls "simple negligence" with the elements for a negligence claim brought under a premises liability theory. Because Sam-Med created the allegedly dangerous condition (the mat), Arace seems to argue, he needed only to prove the elements of "simple negligence" and it was error for the trial court to require him to prove the existence of a dangerous condition.

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judgment entered after both plaintiff and defendant had presented their evidence, the court stated that it could be " 'misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.' " (*Id.* at 465; quoting *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) As it was put in the case upon which *Sonic Manufacturing* relied, where an appeal involves a failure of proof at trial, the "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations]." (*In re I.W., supra,* 180 Cal.App.4th at p. 1528.) "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*Ibid.*; quoting *Roesch v. De Mota* (1944) 24 Cal.2d 563, 571.)

Sam-Med asserts that this is a test entirely distinct from substantial evidence and that it should be applied here. We cannot adopt this approach because it is settled as a matter of binding precedent that the substantial evidence test applies to appeals from section 631.8 motions. (See, e.g., *Locklin v. City of Lafeyette, supra,* 7 Cal.4th at pp. 369-370.) In addition, the same conceptual problem with use of the substantial evidence test in appeals involving a party's failure to meet its burden of proof has already been addressed with regard to appeals from section 631.8 judgments in a manner which would result in very few differences in outcome, if any, between the two approaches. (See *Greening, supra,* 233 Cal.App.2d at pp. 550-551.) Finally, the difference between the test applied in *Sonic Manufacturing* and the substantial evidence test, as it is usually applied, has been recognized as a "conceptual and substantive distinction *within the substantial evidence analysis* depending on who has the burden of proof on a particular issue, which party prevailed on that issue and who appealed." (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965 [italics added; see also *In re R.V.* (2015) 61 Cal.4th 181, 200 ["There is . . . no single formulation of the substantial evidence test for all its applications"].) We repeat here that parties appealing from a judgment based upon their failure of proof at trial should point out the distinction and that not doing so can be "misleading." (*In re I.W., supra,* 180 Cal.App.4th at p. 1528.)

We reject Arace's approach. In order to establish that a property owner is liable for negligence, a plaintiff must prove the same elements as are required for every negligence claim: duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) The duty in such cases is "to exercise reasonable care in keeping the premises reasonably safe. [Citation]." (*Ibid.*)

We are aware of no California authority which suggests (and Arace has pointed us to none) that, where plaintiffs allege that an unsafe condition was created by the owner of the property, then they are not required to prove that an unsafe condition existed in the first place. As it has been held, "'liability is particularly appropriate where the landowner has actual knowledge of the danger, e.g., where he has created the condition.' [Citation]." (*Robison v. Six Flags Theme Park* (1998) 64 Cal.App.4th 1294, 1304, see also 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1120, pp. 452-453.) So, if defendant creates a dangerous condition, it may make it easier for plaintiff to prove a case for negligence, but it does not negate the requirement to prove the existence of the condition in the first place.

In any event, in support of his general negligence claim (which Arace asserts was either misconstrued or ignored by the trial court), the only negligent act on Sam-Med's part alleged by Arace was the creation of "an unstable floor in the common area of the building . . . ." The unstable condition was, according to Arace, caused by "a mat that was not fixedly secured to the tile floor . . . ." Arace does not identify on appeal any independent basis for holding Sam-Med liable for negligence other than the condition which he identified in his complaint, i.e., that of the unsafe floor caused by the unsafe mat.[9] "As to any given defendant, only one standard of care obtains under a particular set

[9] Because Arace's theory of his case involved an unsafe condition on the Sam-Med's property, his argument that the trial court should not have referred to the jury instructions at CACI No. 1003 is mistaken. CACI No. 1003 is meant to be used in combination with CACI No. 1000 in "a premises liability case involving an unsafe

of facts, even if the plaintiff attempts to articulate multiple or alternate theories of liability." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 998.) None of the arguments presented by Arace on this point convince us that the trial court erred.

III. The Trial Court's Findings On Arace's Negligence Claim Were Supported By Substantial Evidence

Arace next argues that the trial court's findings that he had failed to prove Sam-Med's breach of its duty and that he had failed to prove causation were not supported by substantial evidence. We disagree.

Arace points to the testimony of several witnesses he asserts shows a reversible error on the issue of breach of duty. First, Arace points to the statements made by Dr. Morgensen that it was Sam-Med's decision to place the mat on the floor, that he would inspect the mat from time to time, and that he functioned as both a physician and building manager while he was on the property. These statements, however, do not seem relevant to the issue of whether the mat constituted an unreasonably unsafe condition on the property. Insofar as Arace raises these statements in an effort to resurrect his argument that he did not need to show the existence of a dangerous condition at all, we have already rejected that argument.

Arace next points to the testimony of his brother, Paul, who both parties appear to concede was the only witness to the fall. Arace asserts that Paul testified: 1) that he saw him trip on the mat and fall; 2) that he saw Arace hit the corner of the mat; 3) that the

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condition on property." (CACI No. 1003, p. 568.) And this is precisely what Arace's case was about.

corner of the mat flipped up when Arace hit the corner of it; 4) that Arace lost his balance, and; 5) that it was the mat's flipping upward that caused Arace to fall.[10]

However, Paul also testified that on his many visits to Sam-Med's property over the approximately two to three years before the fall occurred, he never saw a problem with the mat. He stated as well that, on the day of the fall, he did not see anything unusual with the mat and that he had no difficulty getting across the mat himself that day. Paul also testified that his brother had a limp on the day of the fall and confirmed that Arace had been hospitalized in 2007 for difficulty breathing, weakness, and an inability to walk. Arace himself stated that he had walked through the lobby over 30 to 40 times without incident.

Next, Arace raises the testimony of Olson, the nurse who attended to Arace after he fell. Arace points to the fact that Olson testified that she is a competent nurse and paramedic, that she saw Arace's wounds, and that these wounds could be caused by falling to the floor. As the trial court's statement of decision points out, however, Olson did not in fact see Arace fall. And none of the testimony emphasized by Arace relates directly to the question of whether Sam-Med's floor or mat was unreasonably dangerous.

Finally, Arace point us to the testimony of Dr. Nemire, the expert witness presented at trial, who stated that the mat was not secured to the floor, that it was an unreasonable tripping hazard because of its thickness, and because it was difficult to

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[10] The parties dispute on appeal whether Paul ever testified, precisely, that Arace "tripped" on the mat. A similar dispute at trial over Paul's use of the word led the trial court to conclude that there was "no mention of a trip," to which Arace's counsel responded that Paul had testified that Arace had "hit the mat . . . ." In fact, Paul did use the word in his testimony, though not at the location in the trial transcript provided in Arace's brief. We do not consider this dispute material, however, because the trial court's statement of decision notes specifically that Paul testified that his brother's foot "hit the corner of the mat and it 'kind of flipped up.' "

see.[11] However, on cross-examination, Dr. Nemire stated that it was "not clear from the evidence how—exactly how the Plaintiff interacted with the mat, period." Dr. Nemire also stated that Arace could have tripped on the edge of the mat, that he could have been a victim to a "stick and fall" or he could have slipped on the mat because it was loose. When pressed to determine how Arace fell, Dr. Nemire stated: "Just that there is [*sic*] indication that it was through an interaction with the mat." Given this impeachment of Dr. Nemire's testimony and the other testimony presented to the trial court, it cannot be said that the trial court's finding that Arace had failed to prove Sam-Med's breach of any duty it owed to him was unreasonable in light of the evidence presented. (*Greening, supra,* 233 Cal.App.2d at pp. 550-551.)

Because we affirm the trial court's finding on breach of duty, we need not consider whether substantial evidence supported its finding on causation, as Arace had the burden to prove both in order to prevail on his negligence claim. (See *Ortega v. Kmart Corp., supra,* 26 Cal.4th at p. 1205 [listing elements of premises liability negligence claim].)

We do note briefly, however, that none of Arace's arguments show a reversible error occurred regarding this element either. Arace points to his own general testimony

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[11] Arace asserts that Dr. Nemire's testimony should have been deemed conclusive by the trial court because it was uncontradicted expert testimony on the standards applicable to what Arace calls "professional building managers." The case Arace relies upon for this argument shows that he has "seriously misstated the law." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632 (*Howard*).) *Howard* restated that, as long as a trier of fact does not act arbitrarily, " 'he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted' " and that this rule applies equally to expert witnesses. (*Ibid.*; quoting *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) The " 'single exception' " applies "*only* in professional negligence cases where the standard of care must be established by expert testimony." (*Ibid.*; quoting *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 507-510.) As Sam-Med is not a professional nor has Arace alleged a malpractice claim against it, Arace's reliance on *Howard* is misplaced and the trial court was not bound to accept Dr. Nemire's testimony as conclusive.

about falling, his brother Paul's testimony, and that of the nurse, Olson, in his effort to show that the trial court erred on causation.[12] Regarding his own testimony, as the trial court's statement of decision points out, Arace did not state what caused him to fall, and so it is difficult to understand why Arace brings this up on appeal. And, as we have discussed, the nurse, Olson, also testified that she did not see him fall. Regarding Paul's testimony, again as we have stated above, the trial court was also presented with evidence that Arace had fallen in the past in locations other than Sam-Med's lobby, that he had difficulty walking, and that neither Dr. Morgensen or Paul (or for that matter, Arace) had ever had seen a problem with the mat. It was, therefore, perfectly reasonable to find that Arace had failed to meet his burden to show that Sam-Med had caused Arace to fall.[13]

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[12] Arace also refers to evidence regarding the length of his hospital stay and the emotional harm he suffered as a result. This, of course, is related to damages, an element of negligence not relevant to this appeal. In addition, given our conclusion that the trial court's findings on breach and causation were supported by substantial evidence, we need not address whether Arace's failure to introduce testimony from a medical doctor as to the cause of his injuries was fatal to his case.

[13] On several occasions in his brief, Arace argues that the trial court's rejection of his evidence was arbitrary because it was uncontradicted and because the trial court did not explain the reason for disbelieving it in its statement of decision. Essentially, Arace asks us to invoke the rule that uncontradicted testimony of a witness to a particular fact may not be disregarded but should be normally be accepted as proof of the fact in question. (See *County of Ventura v. Marcus* (1983) 139 Cal.App.3d 612, 616-617.) However, "[a]n essential element of the rule stated . . . is the lack of either contradiction or impeachment. Where either factor is present, there is a rational basis for the rejection of the testimony and the trier of fact may do so in the process of weighing the evidence." (*Id.* at 617.) Here, given the evidence of Arace's prior falls and the fact that all of testimony of his witnesses was impeached (including that of Dr. Nemire and Paul), the rule does not apply. While it may be true that the statement of decision could have been clearer in its reasoning, the statement of decision responded to the requested findings as stated by Arace. A statement of decision need not "address all the legal and factual issues raised by the parties." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125.) It "need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." (*Id.* at 1125.) The statement of decision is "*not* required to

IV. The Trial Court Did Not Err In Refusing To Apply Res Ipsa Loquitur

Arace next argues that, even if he had failed to satisfy his burden of proof, reversal is still warranted because the trial court erred in refusing to apply the doctrine of res ipsa loquitur. We disagree.

"The doctrine of res ipsa loquitur is too familiar to warrant a lengthy explanation." (*Brown v. Poway Unified School District* (1993) 4 Cal.4th 820, 825 (*Brown*).) "In brief, certain kinds of accidents are so likely to have been caused by the defendant's negligence that one may fairly say 'the thing speaks for itself.' The Latin equivalent of this phrase, 'res ipsa loquitur,' was first applied to a barrel of flour that rolled out of the window of the defendant's warehouse onto the plaintiff. (*Byrne v. Boadle* (1863) 159 Eng.Rep. 299, 300.)" (*Ibid.* at p. 825.)

The "judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence." (Evid. Code, § 646, subd. (b).) Three conditions are necessary for a court to employ the presumption: " '1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' [Citation]." (*Ybarra v. Spangard* (1944) 25 Cal.2d 486, 489.) The plaintiff has the burden to establish all three conditions. (*Howe v. Seven Forty Two Co, Inc.* (2010) 189 Cal.App.4th 1155, 1161.)

Our Supreme Court has stated that "[e]xperience teaches that slips and falls are not so likely to be the result of negligence as to justify a presumption to that effect." (*Brown,*

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address how it resolved intermediate evidentiary conflicts, or respond point by point to the various issues posed in appellant's request for a statement of decision." (*Id.* at 1126.) Although the parties dispute, here and there in their briefs, whether the doctrine of implied findings applies, the dispute is not material to our review of the judgment in this case.

supra, 4 Cal.4th at p. 826.) "This common wisdom is reflected in a legion of cases from many jurisdictions declaring as a general rule that res ipsa loquitur does not apply to slip and fall cases." (*Ibid.,* fn. omitted.)

In its statement of decision, the trial court found that an inference of negligence did not arise simply because of a fall and stated that Arace had not shown that there was a condition on Sam-Med's property that created an unreasonable risk of harm. Arace argues that there was a lack of substantial evidence to support these findings. He points to Dr. Nemire's testimony that people usually do not fall unless there is something wrong with the surface they are walking on, his own statement that he had never fallen during his postal delivery duties and on the day of the fall, and to his brother's Paul testimony.[14]

None of this is convincing. Even had Dr. Nemire testified as Mr, Arace represents, the trial court was entirely free to disregard his statements. (See *Roth v. Parker, supra,* 57 Cal.App.4th at p. 550.) And the idea that falls do not occur unless there is something wrong with the surface is contrary to the " 'common knowledge' " referred to by the Supreme Court. (*Brown, supra,* 4 Cal.4th at p. 826.) In addition, Dr. Nemire also stated that it was possible that people can fall because of the way the walk, because they are not paying attention and because they have a visual impairment. There is, of course, the additional evidence, discussed already, that Arace had suffered from a variety of health issues which affected his walking. There was no error in the trial court's refusal to apply res ipsa loquitur.

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[14] Arace also argues that Sam-Med had exclusive control over the mat and repeats his argument that the trial court should not have required him to prove that an unreasonably dangerous condition existed on the property. The first point is uncontested and, given the other evidence before the trial court, not determinative. The second point we have already rejected *ante*.

V. There Was No Error In The Trial Court's Refusal To Shift The Burden of Proof

Arace also asserts that the trial court erred in not shifting the burden of proof to Sam-Med to disprove causation as a result of Sam-Med's discarding of the mat upon which Arace fell. The trial court, in its statement of decision, found that it was "understandable and reasonable" for Sam-Med to have thrown the mat away given that "there was blood all over" it, that it was not impossible for Arace to have proven his case without the mat, and that Arace's counsel had indicated during oral argument on the motion for judgment that the case was not necessarily about the mat, but about the use of the mat.

"Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code § 500.) More specifically, a "party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue." (Evid. Code § 521.) Thus, Arace bore the burden to prove each fact necessary to show all the necessary elements of a negligence claim.

On "rare occasions, the courts have altered the normal allocation of the burden of proof. [Citation]." (*National Council Against Health Fraud, Inc. v. King Bio-Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336, 1346 (*National Council*).) Our Supreme Court has stated that the burden of proof may be shifted only in "exceptional circumstances"—and that any such exceptions to the general rule are " 'few and narrow' " and the reasons justifying the shift in the burden must be " 'compelling.' [Citations]." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25.)

As a general rule, a plaintiff must establish a prima facie case or substantial probability of causation as a condition precedent to a shift in the burden of proof. (*Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, 1719.) Although this requirement has less force when a plaintiff cannot make even a prima facie face because critical evidence was

lost due to defendant's negligence (*Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1427), the shift in the burden of proof from the plaintiff to the defendant "rests on a policy judgment that there is a substantial probability the defendant has engaged in wrongdoing and the defendant's wrongdoing makes it practically impossible for the plaintiff to prove the wrongdoing." (*National Council, supra,* 107 Cal.App.4th at 1346.)

"In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact.' [Citation]." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661 (*Lakin*).)

Finally, as it has been stated, " ' "the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. " ' [Citations]." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35-36.)

Applying these principles, we find no compelling reason that the burden of proof should have been shifted to Sam-Med. To begin with, Arace failed to show that Sam-Med was guilty of any wrongdoing in disposing of the mat. It was undisputed at trial that, after plaintiff's fall, the mat was covered in blood. Nancyanne Olson, who was a nurse at the endoscopy center on the date Arace fell, testified that it was expected the mat would be removed "right away" because the blood on the mat created a "hazardous situation." Dr. Morgensen testified that he had learned that the mat had been thrown away by a member of his staff, Sharleen Kakolewski. Although he was not sure of the exact date, Dr. Morgensen also testified that he was not asked for permission before the mat was discarded. The most that appellant was able to show at trial was

Dr. Morgensen's supposition that, depending on the quantity of blood, the mat could have been washed rather than thrown away.

In addition, Arace did not show a "substantial probability" of causation before he attempted to shift the burden. (*National Council, supra*, 107 Cal.App.4th at pp. 1346-1347.) As the trial court noted, Arace himself did not state what caused him to fall, another witness, Olson, said she did not see the fall. And, as recited above, there was evidence available to the trial court to infer that the mat had nothing to do with Arace's fall.

In addition, from the evidence submitted to the trial court, Sam-Med was not in possession of any superior knowledge which would have justified shifting the burden of proof. (See *Lakin, supra,* 6 Cal.4th at pp. 660-661.) In some situations, where defendants have possessed greater knowledge about a particular fact or series of facts necessary for a plaintiff to prove a case, the burden of proof has been shifted. (See *Sanchez v. Unemployment Ins. App. Bd.* (1977) 20 Cal.3d 55, 71 [in a claim for unemployment benefits, shifting burden to the Department of Employment Development to prove that claimant had not made himself available to work to a " 'substantial field of employment' " because of department's greater knowledge of labor market].) Arace has pointed to no analogous superiority of knowledge or expertise on Sam-Med's part which would have justified shifting the burden of proof.

Regarding the "availability of the evidence to the parties," (see *Lakin, supra,* 6 Cal.4th at p. 660), courts have sometimes required a defendant to bear the burden of proof on a particular issue where evidence is in the exclusive or superior control of the defendant. (See *Wolf v. Superior Court, supra*, 107 Cal.App.4th at p. 36 [because defendant had "exclusive control" over records relating to a contingent compensation claim by plaintiff, "fundamental fairness" required shifting the burden].)

Arace, of course, asserts, that he would have been assisted in the presentation of his case had Sam-Med not discarded the mat. However, despite the mat's having been discarded, the court was able to examine a picture of the mat on the day of the fall, plaintiff's expert was able to opine as to the probable characteristics of the mat, and both plaintiff's brother Paul and Sam-Med's witness, Dr. Morgensen, were able to give evidence as to their observations about the mat. The trial court heard Dr. Nemire testify that the mat was too thick, that it was not taped to the floor, and that it was not "conspicuous" enough. While it is perhaps true that possession of the actual mat in question at trial would have been preferable (though it is unclear to whose advantage it would have been), Sam-Med did not have superior access to information about the mat as of trial. This factor therefore does not weigh in favor of shifting the burden.

Arace has also failed to show that the factor regarding " 'probability of the existence or nonexistence of the fact' " (see *Lakin, supra,* 6 Cal.4th at p. 661) weighs in favor of shifting the burden to Sam-Med. As has been discussed above, the trial court's statement of decision recites what it clearly viewed as the dearth of evidence presented by plaintiff, evidence which was irrelevant to the condition of the mat. In arguing that Sam-Med should have borne the burden of proof, Arace fails to precisely argue which fact the possession of the mat would have allowed to be determined which would have lessened the impact of his already skeletal eyewitness testimony.

Finally, Arace fails to show that shifting the burden of proof in this case would have been "desirable result in terms of public policy." (See *Lakin, supra,* 6 Cal.4th at p. 660.) Given the trial court's factual findings, to shift the burden to Sam-Med in this case would be to punish it for acting reasonably. This is in stark contrast with the Supreme Court's decision upon which Arace chiefly relies, *Haft v. Loan Palm Hotel* (1970) 3 Cal.3d 756 (*Haft*). *Haft* was a negligence case in which two people drowned in a motel pool without witnesses to their deaths—the burden to prove that its negligence

did not cause the deaths was shifted to the motel because it had failed to either provide a lifeguard or to post a sign advising that no lifeguard was present, a violation of state law. (*Id.* at pp. 761, 762-763.)

Sam-Med's discarding of the mat in this case is not analogous. Where the defendant's actions in *Haft* directly caused a dangerous condition, Sam-Med's action had the benefit of removing a potential hazard to other patients and staff. No extended discussion is needed to point out the difference, from a public policy standpoint, between a motel's failure to provide a lifeguard for a swimming pool and the removal of a mat covered in blood from the lobby of a medical building. While we certainly condemn, in no uncertain terms, the destruction of evidence that a litigant may reasonably believe would be needed for litigation, Arace has offered us no argument that Sam-Med's discarding of the floor mat was motivated by this purpose. We find no error in the trial court's refusal to shift the burden of proof in this case.

VI. Arace Has Shown No Due Process Violation

Finally, Arace asserts that his due process rights under the United States Constitution were violated. In addition to his argument that he should not have had to prove the existence of a dangerous condition (which, again, we have already rejected), Arace asserts that the changes from trial court's tentative order announced in court and its final statement of decision deprived him of his right to notice and a hearing.

Other than citing to a United States Supreme Court case involving the constitutionality of prejudgment replevin statutes, *Fuentes v. Shevin* (1972) 407 U.S. 67, Arace provides no legal authority for this argument. We need not consider an argument for which no authority is furnished. (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384.) In any event, Arace was represented by counsel in court both when Sam-Med first raised its motion for judgment and when argument on the motion was heard and he also filed lengthy objections to the proposed statement of decision. Arace would have us

declare that any time a tentative decision differs from a final decision of a court, notice of such change and a hearing on such a change is required—even if the attorneys fully briefed and argued the motion in court. The resulting burden would quickly decimate any benefits brought by the availability of tentative decisions to begin with. A "judge's comments in oral argument may never be used to impeach the final order, however valuable to illustrate the court's theory they might be under some circumstances." (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633.) Nor are courts bound by their tentative rulings. (*Ibid.*) (See also Cal. Rules of Court, rule 3.1590(b) [a tentative statement of decision "does not constitute a judgment and is not binding on the court"].) We find no colorable due process claim.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Sam-Med.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

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